IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

No. 80-6839

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SUPREME COURT, U.S.

OCTOBER TERM, 1980

NATHAN BROWN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari

to the Supreme Court of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the appointment of counsel to represent co-defendants in separate trials where the death penalty is sought deprives a defendant of effective assistance of counsel or violates the constitutional standards of due process of law quaranteed by the Fifth, Sixth and Fourteenth Amendments.

2.

Whether the exclusion for cause of fifty-five veniremen from the jury panel because they voiced objection to imposing capital punishment under any circumstances violates the defendant's right to a fair and impartial jury or deprives him of due process of law guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

3.

Whether the imposition of the death penalty upon a finding of aggravating circumstances that the offense was "outrageously or wantonly vile, horrible or inhuman in that . . . it involved torture, depravity of mind, or aggravated battery to the victim" as applied in the case at bar violates constitutional standards for capital sentencing established by the Eighth and Fourteenth Amendments to the Constitution.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Georgia Supreme Court's decision in this case. That opinion is reported at 247 Ga. 298, 275 S.E.2d 52 (1981).

PART ONE

STATEMENT OF THE CASE

Petitioner seeks to have this Court review the decision of the Georgia Supreme Court in Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981), in which the Supreme Court of Georgia affirmed Petitioner's sentence to consecutive sentences of death for murder and the offense of kidnapping with bodily injury (two counts). The Georgia Supreme Court in its decision vacated the death sentence for armed robbery and remanded to the trial court for sentences and reversed the convictions with regard to the possession of a firearm and aggravated assault since the two offenses merged with the armed robbery and kidnapping with bodily injury respectively. Petitioner was convicted in Taliaferrro County, Georgia on May 31, 1979.

A summary of the evidence adduced at Petitioner's trial is contained in the Supreme Court's opinion. A more detailed statement of the facts is as follows. Judson Ruffin, Nathan Brown and Jose High were indicted in Taliaferro in February, 1977, on a multi-count indictment for the aforestated offenses. Brown was tried separately before a jury and was found guilty on all counts and received the death penalty for murder, armed robbery and kidnapping with bodily injury (two counts); a five-year consecutive sentence for possession of a firearm; and ten years consecutive for aggravated assault.

Henry Lee Phillips, the survivor of a murder attempt by Petitioner and his cohorts, described for the jury the events during the late evening hours of July 26, 1976. Phillips operated an Amoco service station off I-20 near Crawfordville, Georgia, with his eleven-year-old stepson, Bonnie Bulloch, helping him. (T. 159-161). A car pulled into the station with three occupants; Phillips recalled the same car being in the station one or two weeks earlier. (T. 160-161, 167-168). Phillips

described Petitioner's car as a 1968 or 1969 off-white Plymouth with mag wheels (T. 160), and identified a picture of the car as the one he saw on July 26, 1976. (T. 166, 168-169). The three men, one identified as Petitioner, got out and one pointed a pistol at Phillips; Petitioner had a sawed-off shotgun. (T. 164, 171-73). Phillips was forced to leave the booth while money was removed from the register and a demand made for more money. (T. 162). When Phillips told one of the men that there was no more money, one of the robbers grabbed young Bonnie Bulloch and told Phillips to get in the car trunk or Phillips and the boy would be killed. Phillips complied. (T. 162, 183).

When later released from the trunk, Phillips found himself and his stepson in the woods. (T. 162). Petitioner poked Phillips in the stomach with the shotgun. (T. 164, 167, 176, 192). Phillips and his stepson were told to lie on the ground. One of the men mentioned getting a rope to tie them up. (T. 164). Phillips then heard shots fired. (T. 164-165). When Henry Lee Phillips regained consciousness he discovered that his stepson was dead. (T. 165). Phillips himself had been shot in the temple and wrist. (T. 165, 214). The bullets were later removed. (T. 175-176, 227). He managed to get to a nearby house and the sheriff was summoned. (T. 165, 196-197, 203). Phillips directed the sheriff to the shooting scene where the body of young Bonnie Bulloch was found. (T. 495-496, 508). The boy was apparently dead on arrival of an ambulance. (T. 213-214).

Phillips identified a picture of Petitioner and two of the accomplices. (T. 171-173). Phillips and other witnesses identified the station's case drawer which had been found near Sharon, Georgia, where the victims had been shot. (T. 182, 199-202, 204-207, 209, 235, 497-498, 500-501, 476-479). It was determined that about $288.00 was missing from the register. (T. 210, 219).

Three witnesses testified that they saw Ruffin's car parked near the Amoco station where Phillips worked at approximately 11:00 o'clock p.m., on July 26, 1976. (T. 145-148, 152-153, 157-158). Two of the witnesses had also seen the car pass by the station before it parked down the road. (T. 147-148, 152-153). At least two people occupied the car, according to two witnesses. (T. 145, 153-154).

The body of Bonnie Bulloch was about one mile from Sharon, Georgia. (T. 220). A plaster cast was made of a tire print found at the scene, (T. 228, 233-234), later determined to be the same as co-defendant Ruffin's car. (T. 285-286, 289-290). A bullet was found on the ground under the victim's body. (T. 680-681).

An autopsy of Bonnie Bulloch revealed two bullet wounds; one in the back of the head and one in the fleshy part of the ear. (T. 297-298). The bullet in the head had penetrated the brain causing his death. (T. 299). This bullet, later identified as a .32 caliber, was removed by Dr. Larry Howard, who performed the autopsy. (T. 298-300).

A Jackson-Denno hearing (T. 311-336), was held to determine the voluntariness of a statement made by Petitioner to GBI Agents Robert Ingram and Monahan. (T. 311, 336). After hearing testimony by Monahan and Ingram the Court overruled the motion as to lack of voluntariness of Petitioner's statement. (T. 339).

Following the hearing, Monahan and Ingram told the jury that they interviewed Petitioner on August 29, 1976. (T. 341-342). Petitioner was interviewed by these agents prior to their talking to High and Ruffin. (T. 353). Phillips had identified Ruffin, High and Petitioner in a photographic lineup. (T. 352). Petitioner was advised of his rights and signed a waiver. (T. 353-357). Petitioner made statements

relating to the shootings, in which he implicated co-indictees, Judson Ruffin and Jose High. (T. 359-362).

During the sentencing phase of the trial, both Petitioner and his mother testified that Petitioner was in the Marine Corp Reserves and had no criminal record prior to this case. (T. 448-450, 454-455). Petitioner denies giving and signing a confession and admits being under the influence of marijuana and wine when the crimes were committed. (T. 456). Petitioner further testified that since he did not kill anybody that he should get life instead of the death penalty. (T. 457-458).

On a portion of cross-examination, Petitioner took the Fifth Amendment. (T. 470-471).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE APPOINTMENT OF COUNSEL TO REPRESENT CO-DEFENDANTS IN SEPARATE TRIALS WHERE THE DEATH PENALTY IS SOUGHT DOES NOT DEPRIVE A DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL OR VIOLATE THE CONSTITUTIONAL STANDARDS OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

As stated previously, Nathan Brown, Judson Ruffin, and Jose High were indicted jointly for a number of offenses including armed robbery, kidnapping with bodily injury and murder. Initially all three co-defendants were represented by the same appointed counsel. Subsequent to such appointment, Defendant High obtained retained counsel. All three co-defendants were tried in separate trials.

Petitioner has now come forward and contended that the trial court improperly allowed him to be represented by the same counsel as Defendant Ruffin. Petitioner agrees that no timely objection was made to such representation but contended in the Georgia Supreme Court that he was entitled to a new trial under the Supreme Court's recent decision in Fleming v. State, 246 Ga. 90 (1980). The Georgia Supreme Court in the Fleming case as an exercise of their supervisory powers over the bar, provided that an attorney cannot represent more than one co-defendant where the State seeks imposition of the death penalty.

In the case at bar, the Georgia Supreme Court stated that the rule set down in the Fleming case was prospective and is to be the guideline to be followed in future cases after the Fleming decision. The Court further stated that unlike the Fleming case in the case at bar, the Petitioner had raised no grounds to show a conflict of interest and in fact there was no conflict of interest or prejudice in counsel representing both the Petitioner and Defendant Ruffin.

In his petition, Petitioner contends that the Fleming rule does not only go to the supervision of attorneys practicing in the State of Georgia but is a procedural constitutional right of defendants developed by this Court in Holloway v. Arkansas, 435 U.S. 475 (1978) and Cuyler v. Sullivan, 446 U.S. 335 (1980). Petitioner fails to recognize that the rule by virtue of it being adopted to apply to practicing attorneys in Georgia does not as such raise it to constitutional standing and the Georgia Supreme Court was correct in deciding that matters of joint representation should be reviewed in cases tried before Fleming by use of the standard adopted by this Court in both Holloway v. Arkansas, supra, and Cuyler v. Sullivan, supra.

Respondent must agree with the Petitioner that under this Court's decision in Cuyler v. Sullivan, supra, where a defendant fails to object to trial to joint representation, an actual conflict of interest adversely affecting the performance of Petitioner's counsel must be shown before there is a Sixth Amendment violation. Petitioner in both his direct appeal and this petition has still failed to demonstrate any conflict of interest that arose by counsel representing both Petitioner and Defendant Ruffin. Petitioner's argument lies in that counsel could not effectively represent two defendants in that he may gain knowledge from one co-defendant which would be beneficial to the other co-defendant but could not be used for the benefit of the co-defendant because of its adverse effect on the other defendant. This argument has no meaning particularly in the case at bar where Petitioner has still failed to address any type of conflict that adversely affected trial counsel. There is no testimony that would have affected one defendant one way and the other defendant in the negative manner. In the situation where there was separate trials, there is no showing that any evidence that might have been available could not have been used in one trial but not in the other. In this particular case, the defenses of the two co-

defendants,Ruffin and Petitioner,were the same. Neither party alleged that he or the other co-defendant were involved in this matter.

Clearly, the Georgia Supreme Court was correct in finding that there was no error in counsel representing both co-defendants in separate trials since there was no conflict of interest which adversely affected trial counsel's representation.

B. THE EXCLUSION FOR CAUSE OF FIFTY-FIVE VENIREMEN FROM THE JURY PANEL BECAUSE THEY VOICED OBJECTION TO IMPOSING CAPITAL PUNISHMENT UNDER ANY CIRCUMSTANCES DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL JURY OR DEPRIVE HIM OF DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Petitioner contends that fifty-five jurors were improperly excused for cause under the principles established by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its protege; Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 298 U.S. 262 (1970) (per curiam); and Davis v. Georgia, 429 U.S. 122 (1976) (per curiam). In Witherspoon v. Illinois, this Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id. at 291 U.S. at p. 522. In Boulden v. Holman, supra, this Court expanded upon its Witherspoon opinion by holding that the principle of Witherspoon was violated by the excusal of jurors for cause when they simply had indicated that they have a "fixed opinion against capital punishment" or that "they did not believe in capital punishment." Id. at 394 U.S. at p. 484. The underlying rationale for its holding was that even though these jurors indicated their feelings against capital punishment, there was no showing that they could not put those feelings aside and abide by the existing law and the Court's instructions.

Likewise, the Boulden rationale was followed in Maxwell v. Bishop, supra, a situation that was similar to that in Boulden. In Maxwell, the Court cited examples with jurors who indicated that they were afraid or thought they had concientious scruples against imposing capital punishment, or they did not believe

in capital punishment. Applying Witherspoon and Boulden, the Court indicated that exclusion of those jurors was erroneous.

Davis v. Georgia, supra, held that the exclusion of one death scrupled juror for a cause was enough to constitute a violation of Witherspoon unless that juror was irrevocably committed before the trial had begun to vote against the death penalty regardless of the facts and circumstances that might emerge.

The most recent examination by this Court of the Witherspoon issue was in the case of Lockett v. Ohio, 98 S.Ct. 2954 (1978). There this Court held that the jurors were properly excluded who answered that they could not take an oath to "truly try the case and follow the law. . . knowing that a possibility existed in regard to capital punishment." Id. at 98 S.Ct. at p. 2960. This Court found that by their answers on voir dire, the jurors had made it "unmistakably clear" that they could not be trusted to "abide by existing law" and " to follow conscientiously the instructions of the trial judge." Id. Thus, they were properly excluded.

In the present case, Petitioner has raised the question that fifty-five prospective jurors were eliminated from the jury panel improperly. Petitioner further contended that certain jurors, namely a Mr. Europe Manago, Sr., were "badgered" into stating that they were opposed to the death penalty and could not impose the death penalty. This was not the case. It is clear in looking at the questions that were asked to the prospective jurors and their answers that the jurors were properly excluded because they stated that they could not impose the death penalty under any circumstances even after listening to the testimony of the case and were therefore properly excluded from the jury panel. Also, at no time did the trial judge"badger"Mr. Mango or any other witnesses as is demonstrated in the transcript of the voir dire examination. (T. 2-103).

The question of witness Mango is a perfect example of the depth that the Court tried to go to understand and make sure that the jurors gave clear answers to the questions presented by counsel. Mr. Mango in answer to each question stated that he was not for the death penalty and that he did not believe that he could vote for imposition of the death penalty. The Court explained that a direct answer must be given and that he could explain any answer. To the question "Do you mean to say that under no circumstances, regardless of what the facts are, could you impose the death penalty?" Mr. Mango responded "I will have to say yes." This response combined with responses given by Mr. Mango to the other questions presented him clearly evidenced his opposition to the death penalty and an inability by him to vote for the death penalty under any circumstances.

Petitioner further contends while not specifically alluding to any particular juror that forty-four jurors were excluded by merely responding to questions addressed by the Court. Specifically, as demonstrated again in the transcript of the voir dire examination, the District Attorney handled the questioning of the jury and in each specific case of the exclusion of a juror, specific questions were answered showing that the person under no circumstances even after reviewing the evidence in this case could vote for the imposition of the death penalty. Therefore, the Georgia Supreme Court was correct in holding that the jurors were not improperly dismissed for cause under the Witherspoon decision.

Petitioner further contends that after the dismissal of these prospective jurors, Petitioner was left with a "hanging panel." The Supreme Court found there to be no merit in this contention which actually was not argued in Petitioner's brief before the Georgia Supreme Court. The Georgia Supreme Court had made a similar decision in the companion case of Ruffin v.

Georgia, 243 Ga. 95 (1979). Further, Petitioner while making allegations that the panel was unrepresented makes no showing before this Court that the panel left after the exclusions were improperly composed. Therefore, Petitioner's contentions are without merit.

C. THE IMPOSITION OF THE DEATH PENALTY UPON A FINDING OF AGGRAVATING CIRCUMSTANCES THAT THE OFFENSE WAS "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT . . . IT INVOLVED TORTURE, DEPRAVITY OF MIND, OR AGGRAVATED BATTERY TO THE VICTIM" AS APPLIED IN THE CASE AT BAR DOES NOT VIOLATE CONSTITUTIONAL STANDARDS FOR CAPITAL SENTENCING ESTABLISHED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In Petitioner's last allegation, he contends that the trial court did not properly charge the jury in the sentencing phase of the trial so that they were adequately acquainted with the law and possessed a proper interpretation and understanding of statutory aggravating circumstances. Therefore, because of the Court's improper charge, the jury found a statutory aggravating circumstance that was not based upon the evidence presented at trial. Petitioner does not allege any technical defects in the charge or any failure upon the trial judge in charging the required law. His argument relates to a feeling that the charge was suggestive or in some way failed to give a positive feeling toward the Petitioner in the eyes of the jurors after hearing the charge. Petitioner's allegations are without merit. The Supreme Court reviewed the trial court's charge on appeal in light of Fleming v. State, supra, and Hawes v. State, 240 Ga. 327 (1977) and found the charge to be proper. Additionally, Petitioner has not demonstrated in any regard what part of the charge suggested to the jury that a death sentence was in any way more proper than a recommendation of life.

Additionally, the evidence as pointed out by the Georgia Supreme Court clearly justifies the statutory aggravating circumstance being found by the jury. The eleven-year-old child was kidnapped with his father, the manager of the service station. The child rode inside of the vehicle after watching his stepfather being placed into the trunk of the

vehicle. The boy was tormented by the co-conspirators and actually made to beg for his life. At the scene of the execution, the boy's father attempted to reach him but was struck by the Petitioner. The child witnessed this before he was made to lie down on the ground and then shot in the head "in a cold-blooded execution fashion." Brown v. State, supra at 303. As the Georgia Supreme Court had concluded earlier in Hance v. State, 245 Ga. 856 (1980), the psychological abuse that a victim has to go through before his death causes severe mental anguish to the victim in his anticipation of pending death or physical harm and may amount to serious physical abuse or torture and supports a finding of depravity of mind of the defendant. Clearly, under the evidence in this case the jury could find such and the Georgia Supreme Court properly upheld such finding.

Therefore, Petitioner's contentions are without merit.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in the present case be denied.

Respectfully submitted,

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